

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-6106

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

SAMUEL H. SLOAN individually and d/b/a
SAMUEL H. SLOAN & CO.,

Defendant-Appellant.



On Appeal from the United States District
Court for the Southern District of New York

ANSWERING BRIEF OF THE SECURITIES
AND EXCHANGE COMMISSION, APPELLEE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-610

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

SAMUEL H. SLOAN, individually and a/b/;
SAMUEL H. SLOAN & CO.,

Defendant-Appellant.

On Appeal from the United States District
Court for the Southern District of New York

ANSWERING BRIEF OF THE SECURITIES
AND EXCHANGE COMMISSION, APPELLEE

COUNTERSTATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the district court's order of civil contempt, entered
to compel the defendant's compliance with a preliminary injunction
entered in this action is appealable.

COUNTERSTATEMENT OF THE CASE

This is in appeal from an order entered in the district court on September 3, 1975, adjudging the appellant, Samuel H. Sloan, to be in civil contempt of a preliminary injunction entered in this action on January 17, 1975.^{1/} That preliminary injunction, inter alia, contained a mandatory provision requiring Mr. Sloan "to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. (or any other broker or dealer registered with the Commission of which Samuel H. Sloan may become a principal or controlling person) as required by Section 17(a) of the [Securities] Exchange Act, 15 U.S.C. 78q(a) and Rule 17a-4 promulgated thereunder." Further, Mr. Sloan was ordered "not to remove, destroy or alter the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. required to be made, maintained and preserved pursuant to Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rules 17a-3 and 17a-4 promulgated thereunder, 17 CFR

^{1/} Mr. Sloan also here appeals from the district court's order entered on Jul 24, 1975 denying his application for an injunction restraining the Commission from "harrassment and annoyance of defendant" and further denying Mr. Sloan's application for an order holding the Commission, its individual members and several members of the Commission's staff in contempt of court and disqualifying them from appearing further in this action. (Appendix to Briefs No. 75-6106 p. 149) (hereinafter A. _____)

240.17a3 and 17a4. . . ." (See, Appendix to Briefs in No. 75-7056 at pp. 37-38) (hereinafter App. ^{2/}).

The Commission initially sought a mandatory injunction in this action based upon the undisputed fact that on November 6, 1974, Mr. Sloan had written to the Commission's New York Regional Office advising that office of his intention to resume activities as a broker-dealer in over-the-counter securities and stating that he would not permit any officer or employee of the Commission to inspect his books and records absent the production of a search warrant. (App. 34; A.22). Subsequently, members of the Commission's staff sought to conduct an inspection of Mr. Sloan's books and records and were refused (App. 19-20, 23, 25).

As a result, inter alia, of Mr. Sloan's refusal to permit inspection, on January 17, 1975, the Commission obtained a preliminary injunction in this action requiring that Mr. Sloan give the Commission access to his books and records. Despite the entry of that preliminary injunction on subsequent occasions Mr. Sloan continued to refuse inspection stating at one point that he was "not particularly inclined to cooperate with the Commission." (A. 24-26).

2/ Mr. Sloan's appeal from the entry of that preliminary injunction has already been dismissed by this Court on January 7, 1976. The Docket Number assigned to the appeal of that preliminary injunction entered in this action was 75-7056.

Insofar as the Commission sought mandatory relief requiring Mr. Sloan to give representatives of the Commission access to his books and records, this was an outgrowth of an earlier enforcement proceeding against Mr. Sloan. In that earlier action Mr. Sloan had been permanently enjoined by Judge Ward from further violations of Section 17(a) of the Securities Exchange Act, 15 U.S.C. 78q(a) and Rules 17a-2 and 17a-4 thereunder, 17 CFR 240.17a3 and 17a4, based upon findings that he had failed properly to maintain, keep current and preserve certain of his books and records as required by those rules. Securities and Exchange Commission v. Samuel H. Sloan, Samuel H. Sloan & Co., 519 F. Supp. 996 at 1001 (S.D.N.Y., 1974). Mr. Sloan's appeal from the entry of that permanent injunction, No. 74-1436 in this Court was also dismissed on January 7, 1976.

In view of Mr. Sloan's repeated refusals to comply with the terms of the district court's order of preliminary injunction, the Commission sought the aid of the district judge in enforcing that order. On March 24, 1975, the Commission moved the district court to adjudge Mr. Sloan to be in civil contempt of the preliminary injunction (A. 20) and on July 22, 1975 that adjudication was made (A. 145). On July 28, 1975, Mr. Sloan moved the district court for reargument of that adjudication of civil contempt which motion was denied on August 13, 1975 (A. 146). On September 3, 1975, the district judge entered his order of civil contempt in which Mr. Sloan was granted 20 days from that date within which to purge his contempt by permitting "immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Sloan & Co." It was further ordered that Mr. Sloan was to appear before the district court on the 26th day of September for sentencing should he fail to purge the contempt by that time (A. 146). The order provided that, in the event that the defendant should fail to appear as ordered, the Commission would be authorized to serve a certified copy of the order of civil contempt upon the United States Marshall who would then be authorized to arrest Mr. Sloan and confine him until such time as he complied with the district court's preliminary injunction.

On the morning of the 26th of September, 1975, Mr. Sloan appeared before this Court on application for a stay of the district court's civil contempt order. Despite the fact that this Court denied that relief in

Mr. Sloan's presence, he willfully failed to appear before Judge Ward that afternoon for sentencing. Mr. Sloan subsequently departed the United States for an extended stay in Iceland.

On February 2, 1976, Mr. Sloan, who was then, in effect, a fugitive, appeared before Judge Ward ^{3/} and after extended discussion, agreed to arrange for an inspection by the Commission's representatives of the books and records of Sloan & Co. at Mr. Sloan's mother's residence in Lynchburg, Virginia. Pending that inspection, Mr. Sloan was remanded by the district judge to the Metropolitan Correction Center in New York City. ^{4/} On Wednesday, February 4, 1976, members of the Commission's staff visited Mr. Sloan's mother's residence in Lynchburg, Virginia and conducted an inspection of the books and records of Sloan & Co. Later that day, Mr. Sloan and counsel for the Commission again appeared before Judge Ward and the order of civil contempt was discharged.

ARGUMENT

I. THE ORDER OF CIVIL CONTEMPT IS NOT PROPERLY BEFORE THIS COURT

A. The Order of Civil Contempt is Not an Appealable Order

An order of civil contempt entered against a party in an ongoing proceeding is not appealable except in connection with an appeal from a final judgment or decree. Fox v. Capital Company, 299 U.S. 105,

^{3/} Mr. Sloan apparently found it necessary to reach some arrangement with the district court because he wanted to appear before this Court on that day for oral argument of another matter.

^{4/} The transcript of that hearing before Judge Ward has not yet been received by the Commission.

107 (1936); International Business Machine Corp. v. United States, 493 F.2d 112, 114, 115 (C.A. 2, 1973); Rosenthal v. Comprehensive Accounting Service Corporation, 314 F.2d 607, 612 (C.A. 7, 1963). 5/

B. The Order of Civil Contempt, Review of Which is Sought Has Been Urged, and, Accordingly, Questions With Respect to That Order Are Moot.

Subsequent to the entry of the order of civil contempt from which which Mr. Sloan seeks to appeal here, he sought a stay of that order before this Court and before the Supreme Court of the United States. In both instances, Mr. Sloan's application for stay was denied. While Mr. Sloan willfully disobeyed the district court's order to appear for sentencing on that civil contempt and departed the country, he voluntarily appeared before Judge Ward on February 2, 1976, and agreed to comply with the mandatory provisions of the preliminary injunction which had been entered against him in this action, and, hence, to purge the order of civil contempt. It was agreed that Mr. Sloan would permit an inspection of his books and records at his mother's residence in Lynchburg, Virginia, and pending that inspection Mr. Sloan was ordered

2/ It is clear that no appeal lies from the district judge's denial of the other motions set forth in Mr. Sloan's notice of appeal. Absent special leave, which Mr. Sloan has neither sought nor obtained, this Court has jurisdiction only of appeals from "final decisions of the district courts . . ." 28 U.S.C. 1291. A judgment is final when it "terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." Parr v. United States, 351 U.S. 513, 518 (1956); United States v. Garber, 413 F.2d 284, 285 (C.A. 2, 1969).

Mr. Sloan's appeal from the preliminary injunction entered in this action (No. 75-7056) was dismissed on January 7, 1976, and the Commission intends to proceed in the district court on its application for a permanent injunction. Review of the district judge's disposition of Mr. Sloan's myriad motions and complaints must await final disposition on the merits.

confined. After the inspection was accomplished by members of the staff of the Commission's New York Regional Office on February 4, 1976, Mr. Sloan appeared before Judge Ward again and was released from custody based upon the Commission's representations that the terms of the mandatory injunction had been complied with. No further order of civil contempt is outstanding with respect to Mr. Sloan at this time and the order of civil contempt appealed from is of no further effect. Accordingly, this appeal from that order of civil contempt is moot and any further consideration of that order before this Court would involve abstract, hypothetical or contingent questions which should not be decided. (Cf. Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972); Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 284 (1966); Alabama State Federation of Labor v. Macadorey, 325 U.S. 450, 461 (1945).

CONCLUSION

For the foregoing reasons, this appeal should be dismissed or, in the alternative, the orders appealed from should be affirmed.

Respectfully submitted,

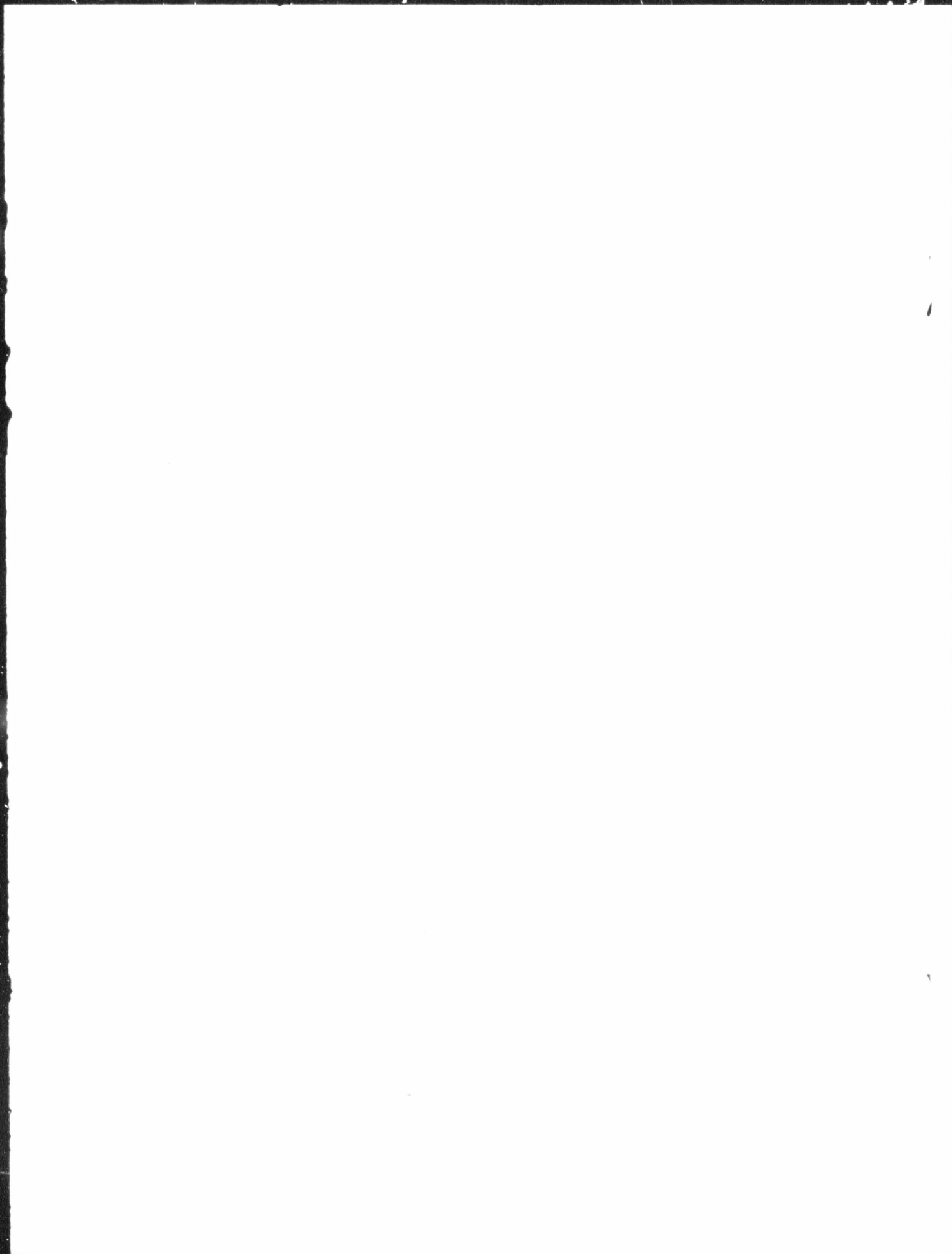
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February, 1976





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February 13, 1976

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Clerk, United States Court of Appeals
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New York, New York 10007

2-18-76

RE: Securities and Exchange Commission v. Samuel H. Sloan
(No. 75-6106)

Dear Mr. Fusaro:

Enclosed for filing are 25 copies of the Commission's
Answering Brief.

I certify that I have caused two copies of the foregoing
to be served upon Samuel H. Sloan, appellant pro se, 1761 Eastburn
Avenue, Apt. A5, Bronx, New York 10457.

Very truly yours,

Thomas L. Taylor, III
Attorney

Enclosures

